

FEODORIA (KALLANDER)
PENNINGTON

IBLA 85-216

Decided May 26, 1987

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying request for partial reinstatement of Native allotment application. A 026476.

Set aside and referred to Hearings Division.

1. Administrative Authority: Generally -- Administrative Procedure: Hearings -- Alaska: Native Allotments -- Applications and Entries: Relinquishment -- Bureau of Land Management -- Hearings -- Patents of Public Lands: Suits to Cancel -- Rules of Practice: Appeals: Hearings

BLM has the authority to determine whether a relinquishment of a Native allotment application was voluntary and knowing and not fraudulently procured in making a preliminary determination whether to recommend a suit to cancel a patent, which was issued to the State of Alaska after the relinquishment with respect to land originally covered by the allotment application. Where the applicant requests an oral hearing to present evidence on the validity of a relinquishment, the Board will order a hearing pursuant to 43 CFR 4.415, in which the State will be allowed to intervene.

APPEARANCES: Colleen DuFour, Esq., Anchorage, Alaska, for appellant; Michael G. Hotchkin, Esq., Office of the Attorney General, State of Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Feodoria (Kallander) Pennington has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated November 1, 1984, denying her request for a partial reinstatement of Native allotment application A 026476.

On April 19, 1954, appellant filed a Native allotment application for 151.72 acres of land situated in lot 1, sec. 18 and lots 1 through 4 and the SE 1/4 NE 1/4 sec. 19, T. 11 N., R. 6 W., Seward Meridian, Alaska, 1/ pursuant to section 1 of the Act of May 17, 1906, as amended, 43 U.S.C. § 270-1

(1970) (repealed subject to pending application by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1982), effective December 18, 1971). On October 30, 1959, appellant submitted a statement regarding her use and occupancy of the claim, indicating that she was born on the claim on April 5, 1921, and lived there year-long with her parents and grandparents until September 1927, whereupon she attended school in Anchorage, Alaska, during the winter months and returned to the claim in the summer months. Since that time, appellant stated that she had resided on the land only during the spring and summer months. The claim was used in connection with a commercial fishing operation, and contained a number of log and frame structures.

In a land examination report dated September 20, 1962, a BLM examiner recommended that a certificate of allotment be issued with respect to all of the lands sought by appellant, except the SE 1/4 NE 1/4 sec. 19,

T. 11 N., R. 6 W., Seward Meridian, Alaska. The BLM examiner reported that a field examination conducted May 23, 1961, had failed to discover any improvements or evidence of use or occupancy of the SE 1/4 NE 1/4 of sec. 19.

By decision dated February 18, 1963, BLM "rejected" appellant's Native allotment application as to the SE 1/4 NE 1/4 of sec. 19, and approved the application as to the remaining land, based on the land examination report. 2/ A copy of the decision was received by appellant on February 19, 1963.

On March 4, 1963, prior to the running of the appeal period when the rejection would have become final, appellant filed a relinquishment of a "portion" of her Native allotment claim, i.e., with respect to the SE 1/4 NE 1/4 sec. 19, T. 11 N., R. 6 W., Seward Meridian, Alaska. The relinquishment, signed by appellant and dated February 27, 1963, states: "I hereby relinquish to the United States all my right, title, and interest in and to the following described land so that my son, Roy Kallander, may file on same." The relinquishment was accompanied by a February 28, 1963, letter from a realty specialist with the Anchorage Field Office, Bureau of Indian Affairs (BIA), to the Manager of the BLM Land Office, which explained:

While the applicant did make use of the aforesaid 40 acre tract for such activities as berry picking, woodgathering, and hunting, it does appear that her son Roy Kallander had for some years hunted and trapped on this land. He had and still had plans for improving this particular tract and living thereon.

Accordingly, although the applicant feels that she has a legitimate right to this land, she is nevertheless relinquish-ing same in favor of her son who it appears has made greater use of

1/ Appellant originally applied for 111.72 acres of land, including the SE 1/4 NW 1/4 of sec. 19, which is actually a fractional portion of the section (already identified as lot 3). On Dec. 20, 1954, appellant amended her application to substitute the SE 1/4 NE 1/4 of sec. 19, resulting in a total acreage of 151.72. 2/ On July 3, 1963, BLM issued a patent to appellant for the 111.72 acres of land approved for allotment.

the land. Mr. Roy Kallander's application for a Native Land Allotment has been forwarded to your office immediately subsequent to this transmittal and under separate cover.

On November 16, 1983, more than 20 years after appellant filed her partial relinquishment, BLM received a memorandum dated November 15, 1983, from a realty officer, Anchorage Agency, BIA, with an attached letter, dated November 10, 1983, from counsel for appellant to BIA and affidavits of appellant and her husband. In her affidavit, dated November 10, 1983, appellant stated that she had partially relinquished her Native allotment application without the advice of counsel, but on the sole advice of BIA. Appellant explained that BIA had told her that there was no evidence of her use and occupancy of land and that by relinquishing "someone else in my family could apply for it." Appellant stated that BIA "encouraged" her to sign the relinquishment. Appellant noted that her son had applied for the land but his application was denied because he was not old enough to have used the land at the time it was withdrawn as part of the Kenai National Moose Range. ^{3/} Appellant stated: "I would never have signed the paper giving up my right to the land unless I felt someone else in my family could apply for it." Appellant further noted that she had gone to the relinquished 40-acre parcel of land "with my parents, grandparents and uncles to get wood, to pick berries and to trap and hunt," and that her family continues to use the land each summer. Appellant requested reinstatement of her application as to this land. Counsel for appellant forwarded her request to BIA.

In his memorandum to BLM, the BIA realty officer confirmed that appellant had partially relinquished her Native allotment application upon the advice of BIA, specifically, "as a result of a field report which inaccurately stated the requirements of the 1906 Act." The BIA realty officer requested BLM to reinstate appellant's application: "As Mrs. Pennington continues to use and occupy this land to the present days she could still qualify for the 40 acres which, I feel, she was coerced into relinquishing."

By memorandum dated February 8, 1984, the Chief, Native allotment Section, BLM, advised the BIA realty officer that appellant's relinquishment was "knowingly and voluntarily [entered into] and was sanctioned by the BIA" and that therefore "we cannot reinstate the application for Feodoria Pennington, A-026479." On March 20, 1984, counsel for appellant requested an administrative hearing to determine whether appellant's relinquishment was knowing and voluntary, citing Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and Peter Andrews, Sr., 77 IBLA 316 (1983).

In its November 1984 decision, BLM denied appellant's request for a partial reinstatement of her Native allotment application because the relinquishment was considered "knowing and voluntary." Appellant has appealed that decision.

^{3/} The record indicates that Roy Kallander filed Native allotment application A-58791 on Mar. 1, 1963, for the 40 acres of land in the SE 1/4 NE 1/4 sec. 19, T. 11 N., R. 6 W., Seward Meridian, Alaska. That land had been withdrawn on Dec. 16, 1941, by Exec. Order No. 8979 as part of the Kenai National Moose Range. The allotment application was rejected on Apr. 5, 1963.

In her statement of reason for appeal, appellant contends that her partial relinquishment of her Native allotment application was unknowing and involuntary because she was "misinformed about the necessity and consequences of her relinquishment." Appellant states that she partially relinquished her application so that her son could apply for the 40 acres, without being told that he "would not qualify for an allotment because the land had been withdrawn prior to the commencement of his use and occupancy." Appellant characterizes this failure to inform as the fraudulent concealment of a material fact. Appellant also states that she was erroneously informed that she was not entitled to an allotment with respect to the relinquished 40-acre parcel of land. Appellant characterizes this as the misrepresentation of a material fact. Appellant argues that she is entitled to a hearing to resolve the question of whether her relinquishment was knowing and voluntary, citing Pence v. Kleppe, *supra*, and Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979).

In determining whether a Native allotment claim is valid, the Department must, of course, consider whether the claimant has complied with the statutory and regulatory requirements regarding use and occupancy of the claim. Moreover, where a Native allotment claim has been relinquished in whole or in part and the claimant asserts that the relinquishment was not voluntary and knowing or that it was fraudulently procured, the Department is obligated to initially determine whether the relinquishment was valid. This principle has long been recognized by the Department. Deming v. Cuthbert, 5 L.D. 365 (1887).

A document which has been fraudulently procured is, as a matter of law, null and void, as fraud vitiates the document. United States v. Throckmorton, 98 U.S. 61, 64 (1878). "[A] relinquishment which is secured through misrepresentation, fraud or deceit is void." Leo J. Kottas, 73 I.D. 123, 130 (1966), *aff'd*, Lutzenhiser v. Udall, No. 1371 (D. Mont. June 7, 1968), *aff'd*, 432 F.2d 328 (9th Cir. 1970). Although the principle is not as easily attributable in the case of a relinquishment which was not voluntarily and knowingly made as it is in the case of a relinquishment obtained by fraud or deceit, the same principle does apply. In order for such relinquishment to be valid, it must be made voluntarily and with knowledge of the applicant's allotment rights and the consequences of the relinquishment. See Leo J. Kottas, *supra*; Ficker v. Murphy, 2 L.D. 135 (1884); see also Keane v. Brygger, 160 U.S. 276, 287 (1895); O'Brien v. Richtarik, 8 L.D. 192 (1889). [4/] This fundamental precept was recognized by Congress and incorporated as a part of section 905(a)

4/ The question of whether a waiver was voluntarily and knowingly made arises most frequently in cases where a constitutional right has been waived by one accused of a crime. In Edwards v. Arizona, 451 U.S. 477, 482 (1981) quoting in part from Johnson v. Yerbst, 304 U.S. 458, 464 (1938), the Court stated "waivers * * * must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused.'" See also Peter Andrews, Sr. v. BLM, 93 IBLA 355 (1986).

of [Alaska National Interest Lands Conservation Act], 43 U.S.C. § 1634(a) (1982), which provides that legislative approval of certain Native allotment applications would not apply to those applications "knowingly and voluntarily relinquished by the applicant." [5/]

Matilda Titus, 92 IBLA 340, 343 (1986).

The question of whether appellant's relinquishment was voluntary and knowing raises an issue of fact which should be resolved in an adjudicatory hearing pursuant to 43 CFR 4.415. 6/ In Pence v. Kleppe, supra, the court concluded that due process requires an opportunity for an oral hearing prior to Departmental rejection of a Native allotment application, where the applicant is rejected for a lack of evidence of qualifying use and occupancy. Pence is predicated on the conclusion that Native allotment applicants are entitled to special due process protection where their allotment rights are in jeopardy. The reasoning by the court in Pence is equally applicable

5/ In Estate of Guy C. Groat, Jr., 46 IBLA 165 (1980), we recognized that a relinquishment of a Native allotment application signed by an individual other than the applicant, who was not authorized to do so, was not effective as a matter of law. There are other instances in which a relinquishment will be considered ineffective as a matter of law. Moreover, in Kenai Natives Association, 87 IBLA 58, 62 (1985), we expressly recognized that, subject to certain qualifications, section 905(a) of ANILCA, supra, "approved previously relinquished Native Allotment application which were not knowingly and voluntarily relinquished." See also Peter Andrews, Sr. (On Reconsideration), 83 IBLA 344, 346 (1984). 6/ Appellant also notes that the relinquished 40-acre parcel of land was patented to the State of Alaska on Sept. 21, 1964, pursuant to patent No. 50-65-0199. Recently the Board issued a decision, Matilda Titus, supra, which overruled Peter Andrews, Sr. (On Reconsideration), supra, as well as Kenai Natives Ass'n, supra, to the extent they had held that BLM had no authority to consider a request to reinstate a previously relinquished Native allotment application for patented land. In Titus we stated at pages 344-45 that where a Native allotment applicant seeks reinstatement for an application for lands patented to another based on a claim that the relinquishment was involuntary and unknowing, the Department has an obligation to investigate the circumstances of the relinquishment to ascertain whether it was knowing and voluntary. As noted in Matilda Titus, supra at 347: "Should the application be reinstated, under State of Alaska v. Thorson (On Reconsideration), [83 IBLA 237, 91 I.D. 331 (1984)], the Department would have a duty to make a determination as to the validity of the allotment claim and, if appropriate, to pursue recovery of the land through negotiation or litigation."

We note that even assuming the relinquishment was involuntary and unknowing in this case, this Native allotment parcel was not subject to statutory approval under section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982), as the subject land was withdrawn in 1941 and patented to the State in 1964. Thus, adjudication of the claim would be required under the Native Allotment Act and any decision on efforts to recover title to the land would necessarily hinge on careful consideration of whether appellant established the required use and occupancy. See Angeline Galbraith, 97 IBLA 132, 94 I.D. 151 (1987).

herein where the question is not whether BLM can reject an application but whether an applicant validly relinquished her application. Thus, where the possibility exists that an allotment applicant involuntarily and unknowingly relinquished her allotment application in whole or in part, or was fraudulently induced to do so, she is entitled to the procedural protections of Pence. Aguilar v. United States, *supra*.

Accordingly, we will set aside the November 1984 BLM decision and refer this case to the Hearings Division, Office of Hearings and Appeals, for assignment to an Administrative Law Judge who will conduct an evidentiary hearing on the question of the validity of appellant's relinquishment. The State of Alaska will be notified of the hearing and afforded an opportunity to intervene in the proceedings. At the conclusion of the hearing, the Judge will issue a decision on the question of the validity of appellant's relinquishment. Any party adversely affected by the decision will, of course, have the right to appeal to the Board pursuant to 43 CFR 4.410.

Accordingly, pursuant to the authority delegated to the Board of Lands Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is referred to the Hearings Division for assignment to an Administrative Law Judge who will conduct a hearing and issue a decision on the question of the validity of appellant's relinquishment.

Gail M. Frazier
Administrative Judge

We concur:

James L. Burski
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge.